STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WRIGHT, JR.,

Defendant-Appellant.

UNPUBLISHED
May 2, 1997

No. 185879
Recorder's Court
LC No. 94-007199

Before: Sawyer, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree criminal sexual conduct (armed with a weapon), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e) and with being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Following a bench trial, defendant was convicted of one count of first-degree criminal sexual conduct and one count of attempted first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e); MCL 750.92; MSA 28.287. Subsequently, defendant pleaded guilty to being a fourth habitual offender. As a result, defendant was sentenced, as an habitual offender, to a term of ten to thirty years' imprisonment for the first-degree criminal sexual conduct conviction and two to five years' imprisonment on the attempted first-degree criminal sexual conduct conviction. Defendant appeals as of right, and we affirm.

Defendant argues on appeal that the evidence presented at trial was insufficient to support his conviction. We disagree. In determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Baker*, 216 Mich App 687, 689; 551 NW2d 195 (1996). This standard of review is applicable in bench trials. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11(1985); People *v Vaughn*, 186 Mich App 376, 379; 465 NW2d 365 (1990).

As applicable to the present case, a defendant is guilty of first-degree criminal sexual conduct if, at the time of engaging in sexual penetration, he was "armed with a weapon or any article used or

fashioned in a manner to lead the victim to reasonably believe it to be a weapon." MCL 750.520b(1)(e); MSA 28.788(2)(1)(e); *People v Proveaux*, 157 Mich app 357, 361; 403 NW2d 135 (1987). "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required. MCL 750.520a(l); MSA 28.788(1)(l).

In the instant case, complainant testified that defendant held her at knife-point, that she was able to wrestle the knife away, that defendant then pushed her out of the car, threw her on the trunk, ripped off her shirt, and then began sucking her breasts. Following this, defendant ripped off complainant's panties and forced her into sexual intercourse. Complainant further testified that defendant then moved the two of them from the trunk to the back seat of the car where he once again inserted his penis into her vagina.

Complainant's testimony was corroborated by the testimony of the responding police officers. One officer testified that he went to an alley near Six Mile and Prairie to investigate a report of a woman screaming rape. When he arrived on the scene, he saw defendant's vehicle and a chase ensued. After the chase terminated, complainant jumped from defendant's car toward a scout car. She immediately told the officer that she had been raped, she was crying and appeared hysterical, and the officers noted her shirt undone and reddish marks around her neck. This evidence is consistent with complainant's claim that defendant ripped open her shirt and held her in a choke-hold. Finally, the police found two knifes in the locations where complainant testified that she had thrown them from the car. Viewing the above evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime of first-degree criminal sexual conduct were proven beyond a reasonable doubt.

To the extent that defendant argues that complainant's testimony was inherently incredible, we note that credibility is a matter for the trier of fact to ascertain. This Court will not resolve it anew. *People v Vaughn,*186 Mich App 376, 380; 465 NW2d 365 (1990).

Defendant also argues that the evidence was insufficient to prove that he was armed with a weapon at the time of the assault because, according to defendant, the complainant testified that she had disarmed defendant long before the actual assault occurred. We conclude that defendant was armed with a weapon within the meaning of MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). The use of the weapon was integral to the commission of the sexual act. Moreover, as this Court held in *Proveaux, supra*, "[a] policy that prevents conviction of the first-degree offense merely because at some point during the criminal transaction the offender lost his weapon would not be consonant with the Legislature's intent." *Id.*, 363. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the crime's essential elements proven beyond a reasonable doubt. Thus, defendant's conviction was supported by sufficient evidence.

Finally, defendant argues that he must be resentenced where the trial court erroneously scored Offense Variable ("OV") 5, victim was carried away or held captive, at fifteen points. We disagree,

and hold that, even if the trial court improperly scored OV 5, defendant is not entitled to be resentenced.

In *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996), this Court announced that appellate review of habitual offender sentences using the sentencing guidelines in any fashion is inappropriate. Thus, this Court limited the review of habitual offender sentences to solely considering whether the sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Following *Gatewood (On Remand)*, this Court, in *People v Haacke*, 217 Mich App 434; 553 NW2d 15 (1996), addressed the same issue that is presently at bar. In *Haacke*, the defendant pleaded guilty to several drug-related charges and to being a second habitual offender. *Id.*, 435. The defendant was subsequently sentenced as an habitual offender. *Id*. On appeal, the defendant argued that two Offense Variables were improperly scored. This Court found that one of the Offense Variables was indeed miscalculated. This Court then went on to examine what effect an error in scoring the sentencing guidelines would have on an habitual offender's sentence. *Id.*, 436-437.

The *Haacke* Court reiterated that, pursuant to *Gatewood (On Remand)*, *supra*, appellate review of habitual offender sentences using the sentencing guidelines is inappropriate. *Haacke, supra* at 437. The Court then reasoned that, "if appellate consideration of the guidelines in such circumstances is 'inappropriate,' there concomitantly is no obligation upon the trial court to take the guidelines into consideration in its sentencing determinations for habitual offenders." *Id.* This Court then concluded that the trial court did not err in failing to consider the ***correct*** guidelines range before imposing sentence on the defendant. *Id.*, 438. Consequently, in the instant case, the correctness of the scoring of OV 5 is not a proper issue to review with regard to defendant's habitual offender sentence.

Our review of defendant's fourth habitual offender sentence is limited to whether the sentence violates the principle of proportionality set forth in *Milbourn, supra*, without reference to the guidelines. *Haacke, supra* at 438; *Gatewood (on Remand), supra* at 560. In light of the circumstances surrounding the offense and defendant's background, we conclude that defendant's sentence is proportionate and the trial court did not abuse its discretion in sentencing defendant. *Milbourn, supra* at 636.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Mark J. Cavanagh